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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1940

No. 221

HARRY C. RITTER and CHRIS S. KNAUR,
Petitioners

V.

WYOGA GAS AND OIL CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

J. FRED KATZMAIER
THOMAS WOOD
WM. H. WOOD
Counsel for Petitioners.

Williamsport, Pa.

INDEX

SUBJECT INDEX

	Page
Petition for Writ of Certiorari	1
Opinions of the Court Below	2
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Basis of Decisions Below	5
Reasons for Granting Petition	6
Affidavit and Certificate of Counsel	8
Brief for Petitioners	9
Opinions Below	9
Specification of Error	9
Argument	10

CASE INDEX

Gallagher v. Keystone R. H. Co., et al., 333 Pa. 9 (1939)	15
Grand Trunk Western Ry. Co. v. McHie, 100F. 2nd. 86 (1938)	13
Judicial Code, 28 U. S. C. A. 112, Sec. 51	10
Kline v. Burke Constr. Co., 260 U. S. 226, S. Ct. 79, 67 L. ed. 226 (1922)	10
Pennsylvania Act of 1925 P. L. 23 (12 P. S. 672-674)	14
Salem Kings Products Co. vs. LaFollette, Ore. 196 Pac. 416 (1921)	13
Simkins Federal Practice, Revised Edition, Sec. 397, page 305	11
Smith vs. Lyon, 133 U. S., 315, 33 L. ed., 635, 10 S. Ct. 303 (1890)	11
Simkins Federal Practice, Revised Edition, Section 507, page 464	11
Waterman v. Canal-Louisiana Bank & Trust Co., et al., 30 Sup. Ct. 10, 215, U. S. 33, 54 Law, Ed. 80 (1909)	12

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioners herein respectfully pray that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Third Circuit, under date of March 4, 1940, upon which judgment said Court refused a rehearing on April 12, 1940.

Opinions of the Courts Below.

(1) The Opinion of the District Court of the United States for the Middle District of Pennsylvania is reported in 27 F. Supp. 35 (1939), and appears in the record at (R-55). This Opinion was filed on April 3, 1939.

The Opinion of the District Court on re-argument is reported in 29 F. Supp. 582 (1939) and appears in the record at (R-62). This Opinion was filed October 7, 1939.

(2) The Opinion of the United States Circuit Court of Appeals for the Third Circuit is reported in 110 F. (2d) 524, (1940), and appears in the record of the present proceedings at (R-68). This Opinin was filed on March 4, 1940, and rehearing was denied on April 12, 1940.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered March 4, 1940. (R-69). The petition for rehearing was filed March 29, 1940, and was denied April 12, 1940 (R-70).

The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended, 43 Stat. 938, 28 U. S. C. A. 347.

Question Presented.

The question presented is whether the order of the United States District Court for the Middle District of Pennsylvania, refusing the petitioners' motion to dismiss the complaint for lack of jurisdiction over indispensable parties to an action instituted in said Court on the basis of diversity of citizenship, is interlocutory and not immediately appealable.

Statement of the Case.

The petitioners, together with twenty-four other individuals, are defendants in a suit instituted in the United States District Court for the Middle District of Pennsylvania by the respondent, Wyoga Gas and Oil Corporation.

From shortly after the time the said Wyoga Gas and Oil Corporation was organized on November 28, 1931, until sometime before the present action was instituted, the petitioners and the other defendants, were, at various times, acting as its officers and directors. During this period the plaintiff corporation acquired for development a considerable number of oil and gas leases and interests, most of them from one of the defendants, a certain Geddes H. Schrack.

Control of the plaintiff corporation subsequently passed out of the hands of the defendants, and they were superseded by other officers and directors.

The plaintiff corporation thereupon instituted suit (R-5) against the defendants for the recovery of the damages allegedly suffered by the plaintiff corporation as a result of the defendants' negligence, fraud and misconduct in the transactions just referred to. The plaintiff corporation contended that the defendants had violated the trust imposed in them as officers and directors by making a secret profit in such transactions, and by paying excessive prices for, or otherwise negligently dealing with the leases and interests involved.

The suit was instituted in the Federal District Court for the Middle District of Pennsylvania, since twenty-four of the twenty-six defendants are citizens of and reside in Pennsylvania. However, one of the defendants, Geddes H. Schrack, who was the chief party in

interest in the transactions involved, is a citizen and resident of the State of Ohio (R-7) and another defendant, Bernard Frank, is a citizen and resident of the State of New York (R-7).

Two of the defendants, the petitioners here, moved to dismiss the plaintiff's Complaint (R-53) for the reason that no suit could be maintained in the Federal District Court for the Middle District of Pennsylvania, on the basis of diversity of citizenship unless **all** the defendants were residents of Pennsylvania and the District. It was further maintained by the petitioners that the defendants, Geddes H. Schrack and Bernard Frank, were indispensable parties to the litigation, and that their residence in Ohio and New York ousted the jurisdiction of the Federal District Court for the Middle District of Pennsylvania.

The petitioners contended that the causes of actions averred in the complaint comprehended, not only claims based on alleged joint torts which might result in joint and several liability that could be determined in the absence of the non-resident defendants, but also included claims for accounting and rescission of contract which were inseparably connected with each of the other causes of action and which, under all authorities, could not be determined in the absence of the two non-resident defendants.

The Honorable Albert W. Johnson of the Court below filed an opinion and entered an order on April 3, 1939 (R-55) refusing the motion to dismiss the Complaint and ruling that the Court had jurisdiction to entertain the action.

Re-argument was granted and on October 7, 1939, the Court filed a second opinion and entered an order to the same effect as that entered on April 3, 1939 (R-62).

An appeal was thereupon duly taken to the Circuit Court of Appeals for the Third Circuit (R-64). That Court, in an order issued March 4, 1940, held the ruling of the Federal District Court to be merely interlocutory and dismissed the appeal (R-68).

A petition for rehearing was thereafter filed, which petition was refused on April 12, 1940. (R-70).

Basis of Decisions Below.

The ruling of the United States District Court for the Middle District of Pennsylvania, refusing the petitioners' motion to dismiss the complaint for lack of jurisdiction, was based upon the following portion of the Court's opinion (R-57):

> "In the present case the complaint alleges in substance that the defendants are joint tort feasers. Thus, their liability is joint and several. Under these circumstances the interests of the defendants are so far separable that a final decree can be entered without adversely affecting the rights and liabilities of the non-resident defendants. In short, the non-resident defendants are "necessary," as distinguished from "indispensable" parties. Sauer et al. v. Newhouse et al., 24 Fed. Supp. 911."

The ruling of the Circuit Court of Appeals for the Third Circuit, dismissing the petitioners' appeal from the ruling of the United States District Court for the Middle District of Pennsylvania, was based upon the following portion of the Court's opinion (R-69):

> "Our brief recital of the proceedings in the District Court makes it clear that the order appealed from was not a final order but merely interlocutory in its nature. It follows that we are without jurisdiction to entertain the appeal. Grand Trunk Western R. Co. v. McHie, 100 F. 2d 86."

Reasons for Granting Petition.

The Circuit Court of Appeals for the Third Circuit, in dismissing the petitioners' appeal on the ground that it was taken from an interlocutory order, cited only the case of Grand Trunk Western R. Co. vs. McHie, 100 F. 2nd 86 (1938).

The case thus cited indicates only that certain types of orders are interlocutory and may not be made the sole basis of an appeal; it did not, however, involve an order of a lower court determining its own jurisdiction, nor does it contain any reference whatsoever to an order of that type.

The petitioners submit that the order of a Federal District Court determining its own jurisdiction in a case based on diversity of citizenship, is completely different from the ordinary interlocutory order, and is so fundamental that it may always be made the sole basis for an appeal. An erroneous determination by a lower Court that it has jurisdiction renders all subsequent proceedings entirely void, and an appellate review of such an order may not properly be refused on the ground that it is interlocutory.

The respondent's complaint avers nine separate and distinct causes of action in 211 paragraphs. A trial of these alleged causes of action would consume an extended period of time, both of the litigants and of the District Court, and would entail the expenditure of substantial sums of money for costs and expenses. All facts which must be considered in ascertaining whether the two non-resident defendants are indispensable parties, and thus deprive the lower Court of any jurisdiction over the cause, are set forth in the respondent's complaint. The jurisdiction of the District Court to entertain this action is a matter of very con-

siderable doubt, and to postpone determination of this question of jurisdiction until after trial of the case on the merits would be highly inequitable, is not necessitated by any precedents, and will likely result in needless delay and expenditure to all parties concerned.

In refusing to determine the petitioners' appeal on its merits, the Circuit Court of Appeals for the Third Circuit has so far departed from the accepted course of judicial proceedings as to call for an exercise of your Honorable Court's power of supervision.

Wherefore, your petitioners pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit, requiring that Court to certify the whole record and the case herein to this Court for its review and determination.

HARRY C. RITTER

CHRIS S. KNAUR,
Petitioners.

J. FRED KATZMAIER

THOMAS WOOD

WM. H. WOOD,
Counsel for Petitioners.

STATE OF PENNSYLVANIA
COUNTY OF LYCOMING SS:

Thomas Wood, being duly sworn according to law, deposes and says: I am counsel for the petitioners herein; I have read with within petition and know the contents thereof; all the allegations in the said petition are true to the best of my knowledge, information and belief.

THOMAS WOOD

Sworn and subscribed before me this day of July, 1940.

CHARLOTTE L. KELLER,
Notary Public.

My Commission Expires
August 16, 1942.

Certificate of Counsel.

I hereby certify that the foregoing petition is, in my opinion, well founded and entitled to the favorable consideration of the Court; and that it is not filed for the purpose of delay.

THOMAS WOOD,
Counsel for Petitioner.